cent months half of them were released unconditionally by the police without any charges being preferred against them.

It is public knowledge that crime is rampant and that the police have a difficult job to do. But there are adequate provisions in the Criminal Procedure Code giving the police powers to release persons on bail after arrest pending investigations: see sections 28, 29, 387 and 388 of the Criminal Procedure Code. The procedure to be followed, therefore, should be to investigate first and arrest later. In cases where it is more expedient to effect an immediate arrest, the police should release the person arrested on police bail if investigations cannot be completed to enable a charge to be preferred before the Magistrate. The police undoubtedly have powers to arrest without a warrant from the court in most cases but the power of arrest should not be confused with the subsequent duty to charge in court a person against whom there are reasonable grounds to believe that he has committed a criminal offence. The second stage, however, is only reached when investigations have been completed because only then would the facts to prove the case be available on which to frame a charge. Without such facts, no charge can be drawn up for the simple reason that the charge contains the accusation. That there is a clear distinction between arrest and prosecution is clearly set out in section 120 of the Criminal Procedure Code. The police have powers of arrest and investigation but prosecution is the province of the Public Prosecutor. In cases where the police prosecute, they do so on behalf of the Public Prosecutor, always. It follows that when the police exercise the delegated powers of prosecution, they should always ask themselves the question whether the Public Prosecutor would institute a prosecution in the circumstances of the case.

Turning to the facts of this case, the accused is alleged to have committed criminal breach of trust over a period of four years. It took the police more than a year to investigate yet when the case came up for trial some eight months after the accused was first charged in court, investigations had still not been completed and the police say they need at least another six months. This is a clear case of premature prosecution. What if the investigations disclose that there is insufficient evidence to prosecute the accused or worse still, if he was innocent of the allegation after all. On these facts, the charge as it stands, is clearly groundless. In these circumstances, the learned Magistrate, ought to have exercised his powers under section 173(g) of the Criminal Procedure Code and discharge the accused instead of granting a postponement of the case. I would advise Magistrates to exercise their powers under section 173(g) of the Criminal Procedure Code whenever the prosecution asks for a postponement of a case on the ground that investigations have not been completed.

I direct that the case be remitted to the learned Magistrate to-day for the order to be made.

Order accordingly.

Solicitors: *Lim Soh Wah & Co.*

WONG YON LIN v. LIEW THAM SOON & ORS.

[O.C.J. (Abdoolcader J.) September 6 & 24, 1979]

[Ipoh — Civil Appeal No. 27 of 1975]

Landlord and Tenant — Claim for possession of premises — Whether premises controlled premises — Whether completed after 31st January 1948 — Question of fact for trial judge to determine — Appellate Court not entitled to interfere unless view of trial judge clearly wrong — Control of Rent Act 1966, s. 4(2)(a).

Practice and Procedure — Appeal — Question of fact — When appellate court could interfere.

In this case the respondents claimed possession of certain premises occupied by the appellants. The sole issue before the learned Magistrate was whether the premises were completed after January 31, 1948 and therefore were controlled premises. The learned Magistrate after considering the facts held that the premises were not controlled premises and he accordingly gave judgment for the respondents with costs. The appellants appealed.

Held: (1) the question of change of identity and character of premises is primarily an inference to be drawn by the trial court. It is a question of fact and degree and the appellate court should not interfere unless it is quite plain that the trial judge had come to the wrong conclusion and any advantage which he enjoyed by having been and heard the witnesses was not sufficient to explain his conclusion;

(2) in this case it is abundantly clear that the learned Magistrate has directed himself properly and on the evidence and on the facts before him he could not have come to any other conclusion. The appeal must therefore be dismissed.

Cases referred to:-

(1) *Yong Chiang* v. *Bong Tjhin Oi* [1973] 2 M.L.J. 136.

(2) *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Co. Ltd.* [1976] 1 M.L.J. 224.

(3) *Lau Hee Teah* v. *Hargill Engineering Sdn. Bhd. & Anor.* [1980] 1 M.L.J. 145.

(4) *Chow Yee Wah & Anor.* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.

CIVIL APPEAL.

Lim Seong Chun for the appellant.

N.T. Rajah for the respondent.

Cur. Adv. Vult.

Abdoolcader J.: The respondents instituted proceedings in the Magistrate's Court at Batu Gajah for the recovery of possession of their land in the Mukim of Sungei Trap in the District of Kinta on which stands premises No. B291 Jalan Siputeh, Pusing, occupied by the appellant. The sole issue before the learned Magistrate was whether the premises in question were controlled premises within the meaning thereof in section 4 of the Control of Rent Act, 1966, that is to say, whether or not the premises in question come within the provisions of section 4(2)(a) of the Act in that they were completed after January 31, 1948 and therefore are free from the operation of the provisions of the Act. The learned Magistrate held, and in a very careful judgment has given his reasons for doing so, that the premises are not controlled premises and he accordingly gave judgment for the respondents with costs. The appellant who was given six months to deliver up possession then appealed against the decision and I affirmed the judgment of the learned Magistrate and dismissed the appeal. I should perhaps add that the appeal came up for hearing before me only on September 6, 1979 although the learned Magistrate made his order on August 29, 1975 and on at least two occasions when this appeal was set down for hearing it was taken off the list at the ex-

press request of the solicitors for the appellant with the consent of the respondents' solicitors.

The learned Magistrate quite correctly held that the onus of proof was on the respondents to show that the premises were completed after January 31, 1948 and therefore within the provisions of section 4(2)(a) of the Act in consequence whereof the premises would not be controlled premises and therefore dehors the operation of the provisions of the Act (*Yong Chiang* v. *Bong Tjhin Oi*;[1] *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Company Ltd.*[2]). The learned Magistrate's decision was substantially and primarily one of fact and as I said in delivering the judgment of the Federal Court in *Lau Hee Teah* v. *Hargill Engineering Sdn. Bhd. & Anor.*,[3] the Judicial Committee of the Privy Council has recently reaffirmed in *Chow Yee Wah & Anor.* v. *Choo Ah Pat*[4] that in the face of a finding by the trial judge on a question of fact an appellate court was only entitled to displace his conclusion if it was satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion. And in *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Company Ltd., supra,* Raja Azlan Shah F.J. (now Chief Justice) in delivering judgment in the Federal Court said quite clearly that the question of change of identity and character of premises is primarily an inference to be drawn by the trial court, that it is a question of fact and degree and if it has directed itself properly an appellate court can only interfere if it is quite plain that it has come to the wrong conclusion.

It is not disputed, as counsel for the appellant informed me, that there was an old shed built before 1948 on the land on the site of the present premises. The only question was whether mere repairs had been effected to it in 1961 or whether there had been reconstruction of that shed to an extent resulting in a change of identity and the manifestation of a new building. The second respondent (PW1) gave evidence to the effect that the premises No. B291 were completed in 1961 and that he had personal knowledge because he lived in the same area, that prior to this house being erected there was only an attap store which was only a shed with no walls and that this store was pulled down and the present premises erected on the site. Ooi Sang Kuan (PW2) whose mother had sold the land in question to the respondents testified that the present premises B291 occupied by the appellant were erected in 1961 and that before this there was a dilapidated old attap shed on the site used for storing timber. He went on to say that the present premises built in 1961 had wooden pillars and a zinc roof and is used as a dwelling house.

His evidence is corroborated by that of Lee Teng Chong (PW4), the chief clerk of the Pusing Local Council, who said that the old timber shed which was a very old uninhabited building with an attap roof and open sides was demolished and the present building erected, and the existing building is a house with a corrugated iron roof with walls and a cement floor used as a dwelling house. He said that permission was only granted to repair the old timber shed but it was in fact demolished and it was found that a building was constructed without approval from the Local Council. His evidence is borne out by three letters put in collectively as exhibit P3 (A, B & C) written by the Chairman of the Pusing Local Council and addressed to the appellant's husband. PW4 said the appellant submitted a plan on March 28, 1961 which was returned because it was for a bigger and taller building. He went on to say that the plan was submitted again by a letter dated July 1, 1961 which after signature by the owner of the land was approved and returned for the alterations to be carried out (P3C). P3A is a letter dated October 31, 1961 to the effect that the Council had received the plan for the old dilapidated timber shed intended to be reconstructed and intimating that the Council approved only "the repair in accordance with the old shed". The very next day P3A was written to the appellant's husband wherein the Council complained that the construction of a timber shed had commenced without approval from the Council and asking for the construction work to cease and the submission of a properly drawn plan. The only reasonable inference therefore that can be drawn from this correspondence is that the appellant had infringed the conditions under which the repairs to the old timber shed had been approved by the Council. The learned Magistrate quite properly in his grounds of judgment took cognizance of the site plan put in by the appellant (D2) where the shed in question is referred to as an existing timber storing shed but such houses as were there are indicated as existing houses. It is clear therefore that at the relevant date, namely, January 31, 1948 the premises were only a timber storing shed.

To turn now to the case presented on behalf of the appellant, but before I do so I should perhaps immediately observe that in her defence and indeed in the submission of counsel appearing for her at the outset of the hearing before the learned Magistrate on the question of who should begin she denied the title of the respondents to the land in question, and only perforce had to admit their title while giving evidence under cross-examination. The nature of her defence however is such that she admits a tenancy in respect of the land on which the premises stand. All she could say with regard to the evidence given by PW2 and PW4 was that they were not telling the truth. She said in her evidence-in-chief that she only did repairs to the building which were carried out in accordance with the approval of the Council and that otherwise the condition of the building was the same as when she moved in. She also testified that when she was living on the other side of the road there were people living in the shed B291 and went on to add that the children of the person who was then living in the shed was alive and live in a shop behind her house. As I have said earlier the evidence adduced for the respondents clearly shows that the shed was never inhabited at any time. The appellant did not however choose to call the children of the previous owner of the shed B291 to give evidence, and the full force and vigour of the presumption under illustration (g) to section 114 of the Evidence Act, 1950 must necessarily arise and was indeed correctly applied by the learned Magistrate in this regard.

Neither was the architect who prepared the plans and submitted them to the Council called to give

evidence (exhibits D5 and D6). The architect could certainly have thrown considerable light on the true position and the learned Magistrate was again correct in drawing an adverse inference against the appellant under illustration (g) to section 114 of the Evidence Act in this respect. It is also of some significance and interest to note the heading of the two letters D5 and D6 written by the architect which is "Plan of proposed temporary shophouses to be erected on (the land in question) for (the appellant)". The appellant instead called two old ladies Chin Ah Lam (DW2) and Ewe Khuen (DW3) to testify on her behalf. DW2 said that the defendant has been staying in the premises since the second world war and that the premises have not been pulled down and a new building erected, and that the house has until now been in the same place and in the same condition. Under cross-examination she admitted her memory was bad and that she could not remember whether the building was pulled down or not and agreed that she was the defendant in another eviction action filed by the respondents in the High Court to evict her from the same area. In re-examination she said she did not know whether the defendant's premises had been pulled down or not. DW3 said the appellant's premises had been there before the war and that the condition of the house is still the same as it was before the appellant moved in and that it had a zinc roof, walls and a cement floor. This evidence directly contradicts that of the appellant herself who admitted in cross-examination that previously the shed had an attap roof and some walls and an earthen floor and that the building that now stands there has a zinc roof, walls and a cement floor. DW3 agreed under cross-examination that she also lived on the respondents' land and was afraid the respondents would also evict her and had come to testify without a subpoena and then went on to say that she was old and could not remember and her memory was bad. In the circumstances it is certainly not surprising that the learned Magistrate classified these two witnesses as unreliable and in the same predicament as the appellant and rejected their evidence.

Counsel appearing for the appellant before me had to concede that on the evidence of PW1, PW2 and PW4 it did not appear that the old timber shed was habitable as a dwelling house but he then went on to say, although it is clear from the evidence adduced by the respondents that it had open sides and no walls, these witnesses did not give evidence that there were no rooms in the shed. Rooms without walls? He said this could happen but agreed that the appellant did not give evidence to this effect that there were in fact rooms in the old timber shed. It was also submitted on behalf of the appellant that the letter of November 1, 1961 from the Chairman of the Local Council to the appellant's husband complaining of infringement of the terms of approval by the Council for repairs and requiring the construction work to cease (P3A) does not say which house is referred to and also does not refer to the letter of approval for repairs of the old shed from the Council dated the previous day (P3B). All that I need say with regard to submissions of this nature is that it manifests the desperate state of the appellant's position in this matter that such points should in fact have been taken and only goes to show the appellant was engaged in an attempt to secure her case with ropes of sand.

It would have been very material for the appellant to establish that there were in fact people living in the old shed previously and I have already commented on the failure of the appellant to adduce evidence from the children of the occupier who are at present living in a shop house behind her house. The three authorities cited by counsel for the appellant all involved cases where the premises were lived in and repairs had been effected, and the question that arose for determination was whether the repairs effected resulted in a new building. In the instant matter the learned Magistrate was dealing with a dilapidated old timber storing shed which had been converted to a dwelling and business premises. The learned Magistrate on the evidence adduced by the second respondent (PW1), PW2 and PW4, which he said he had no reason to doubt, and the documentary evidence in P3 and D2 came to the conclusion that it was abundantly clear that the nature and extent of the purported repairs effected to the old shed went far beyond the connotation of mere repairs and in fact had transformed the shed into a dwelling and business premises. The old shed had an earthen floor and attap roof with no walls and the purported repairs effected resulted in structural alterations more in the nature of reconstruction and on the appellant's own admission in evidence under cross-examination the building that emerged and now stands has a zinc roof, walls and a cement floor where she now lives with her family and also carries on the business of a coffin-maker. He accordingly held that the premises in question were in fact constructed in 1961 and constituted a new building and was satisfied on the balance of probabilities that the respondents had discharged the burden of proof which lay on them to establish that the premises were not controlled premises within the meaning of the Control of Rent Act. As I have already observed the question of the change of identity and character of the premises is one of fact and degree, and I can only interfere if it is quite plain that the learned Magistrate has come to a wrong conclusion but it is abundantly clear that he has directed himself properly and on the evidence and the facts before him he could not have come to any other conclusion.

I accordingly dismissed the appeal with costs.

I should perhaps add that when I came to consider the question of time for delivery of vacant possession, the respondents very generously agreed to a period of some six months although the learned Magistrate made his order on August 29, 1975 and the appellant has been in possession since that date. Notwithstanding this generous gesture on the part of the respondents the appellant then spared no pains in maligning the respondents by alleging bad faith on their part in that they were only motivated in these proceedings to put her out of business. This point is of course quite irrelevant to the issue in question but in any event there is not a shred of evidence to this effect nor was the point taken before the learned Magistrate or in the course of the appeal before me.

Appeal dismissed.

Solicitors: *Lim Seong Chun & Co.; Maxwell, Kenion, Cowdy & Jones.*